

**United States Small Business Administration  
Office of Hearings and Appeals**

IN THE MATTER OF:

Castle-Rose, Inc.

Appellant

RE: H&H-DMS Joint Venture

Solicitation No. HSCG88-09-R-623066

SBA No. VET-178

Decided: January 27, 2010

APPEARANCES

Jason Smith, Vice President, Castle-Rose, Inc., for Appellant.

Kevin R. Harber, Esq., Office of General Counsel, for the Small Business Administration.

DECISION

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 125 and 134.

II. Issue

Whether the Small Business Administration's Acting Director for Government Contracting made a clear error of fact or law in dismissing the protest of Castle-Rose, Inc. for lack of specificity. *See* 13 C.F.R. §§ 125.27(b), 134.508.

III. Background

A. Protest and SDVO SBC Status Determination

On February 19, 2009, the Department of Homeland Security, United States Coast Guard, in Oakland, California (Coast Guard), issued Solicitation No. HSCG88-09-R-623066, for regional multiple award contracts for construction at various facilities. The Coast Guard designated portions of the procurement for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs).

On October 23, 2009, the Coast Guard informed unsuccessful offerors of the identity of 21 apparent successful offerors for two portions of the procurement designated for SDVO SBCs. On October 30, 2009, Castle-Rose, Inc. (Appellant) protested both the SDVO SBC status and the size status of H&H-DMS Joint Venture (H&H-DMS JV), and several other concerns. The part of the protest concerning H&H-DMS states:

DMS is an established 8(a) firm based in Salt Lake City. The address for the JV is the same address for DMS - not address for H&H. H&H, as the alleged SDVO SBC, was not readily identifiable. The address for the joint venture indicates a violation of SDVO SBC joint venture requirements. Further, DMS has 18 offices in multiple states. Due to the lack of information relative to the alleged SDVO SBC - there is a significant probability that DMS in combination with any entity exceeds the size standard for this solicitation.

Protest File at 17 (Protest at 3).

On November 25, 2009, the Coast Guard referred the SDVO SBC protest to the Small Business Administration (SBA). On December 4, 2009, the SBA's Office of Government Contracting-Area VI issued Size Determination No. 6-2010-032 (Size Determination) concluding H&H-DMS JV is an eligible small business. On December 22, 2009, the SBA's Acting Director of the Office of Government Contracting (AD/GC) dismissed Appellant's SDVO SBC protest for lack of specificity pursuant to 13 C.F.R. § 125.25(b).

#### B. Appeal Petition

On December 31, 2009, Appellant filed the instant appeal of the AD/GC's dismissal with the SBA Office of Hearings and Appeals (OHA). Appellant asserts that its protest consisted of two allegations -- (1) "The address for the JV is the same address for DMS - not address for H&H" and (2) "H&H, as the alleged SDVO SBC, was not readily identifiable" -- and that the AD/GC improperly dismissed the first allegation and failed even to acknowledge the second.

Regarding the first allegation, Appellant explains it had alleged that the address for H&H-DMS JV is the office of DMS, the non-SDVO SBC joint venturer, rather than that of H&H, the SDVO SBC joint venturer. Thus, the requirements of 13 C.F.R. § 125.15(b)(ii), that the SDVO SBC joint venturer must be the managing venturer and that the SDVO SBC joint venturer must employ the project manager, cannot be met and, therefore, there is a violation of the joint venture requirements.

As for its second allegation, Appellant cites the definition of "common facilities" in FAR 19.101(6)(ii), and asserts that, because H&H "is not identified" and "[w]ithout being able to cross reference H&H with DMS," it is impossible to determine whether H&H is affiliated with DMS. Further, if H&H and DMS share offices and resources, then they are affiliated under FAR 19.101(6)(ii) and, since the address for H&H, the alleged SDVO SBC "is not independently identifiable," the "default assumption" is that an affiliation violation exists.

### C. Response to the Appeal

On January 14, 2010, SBA filed its response to the appeal. SBA contends that the AD/GC's dismissal of Appellant's protest was not based on a clear error of fact or law and should be upheld. SBA cites two previous OHA decisions for the proposition that a protestor must do more than simply point to a lack of available information in order to satisfy the protest specificity requirement.

## IV. Analysis

### A. Timeliness and Standard of Review

Appellant filed its appeal petition within 10 business days of receiving the AD/GC's determination, and thus the appeal is timely. 13 C.F.R. § 134.503.

The standard of review for SDVO SBC appeals is whether the AD/GC's determination was based on clear error of fact or law. 13 C.F.R. § 134.508. In determining whether there is a clear error of fact or law, OHA does not evaluate whether a concern met the eligibility requirements of 13 C.F.R. §§ 125.9 and 125.10 *de novo*. Rather, OHA reviews the record to determine whether the AD/GC based his decision upon a clear error of fact or law. 13 C.F.R. § 134.508; *see Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006) (discussing the clear error standard in the context of a size appeal). Consequently, I will disturb the AD/GC's determination only if I have a definite and firm conviction the AD/GC erred in making a key finding of law or fact.

### B. Protest Specificity

An SDVO SBC protest must be specific and a "protest merely asserting that the protested concern is not an eligible SDVO SBC, without setting forth specific facts or allegations is insufficient." 13 C.F.R. § 125.25(b). The SBA's AD/GC must dismiss a non-specific protest. 13 C.F.R. § 125.27(b).

As to a particular concern, the AD/GC may only consider a protest that "presents specific allegations supporting the contention that the owner(s) cannot provide documentation . . . to show that they meet the definition of service disabled veteran..." and/or "presents credible evidence that the concern is not 51% owned and controlled by one or more service-disabled veterans." 13 C.F.R. § 125.26. Where the offeror is a joint venture rather than a single concern, as here, control over the joint venture is another issue for protest. *See* 13 C.F.R. § 125.15(b); *Matter of C3T Construction Company, Inc.*, SBA No. VET-157, at 3 (2009). A protest against a joint venture offeror also must contain specific allegations or it will be dismissed. *Id.*

Appellant's protest alleged that H&H-DMS JV, the joint venture offeror on the instant procurement, is not controlled by H&H, the SDVO SBC joint venturer, but by DMS, which is not an SDVO SBC. Thus, H&H-DMS JV violates the joint venture rules and, therefore, is ineligible for this procurement. In support of these allegations, Appellant asserted that: (1) DMS is an 8(a) firm based in Salt Lake City; and (2) H&H-DMS JV and DMS share the same address.

Despite Appellant's claim to have conducted fact-finding research in various Internet databases, Appellant presented no evidence, beyond its own say-so, that either of its factual assertions is true. Appellant did not even state what the allegedly shared address was. All the protest contained relevant to any joint venture violations were the two bare and unsupported factual assertions noted above. These two unsupported factual assertions are per se insufficient to support Appellant's allegation that H&H-DMS JV is in violation of any of the SDVO SBC joint venture requirements set out in 13 C.F.R. § 125.15(b)(ii). The protest contains no other assertions of fact supporting Appellant's allegation of joint venture rule violation, although there are other assertions of fact there that were relevant to Appellant's size protest.

On appeal, Appellant clarifies that its rather convoluted theory of SDVO SBC joint venture violation involves "common facilities," as described in FAR 19.101(6)(ii), between H&H and DMS. Appellant asserts, further, that because the alleged SDVO SBC "is not independently identifiable," the "default assumption" is that an affiliation violation exists. Appellant is mistaken on both points. First, "common facilities" between H&H and DMS, even if proven (and Appellant presented nothing but its own lack of knowledge in support of its theory that the two concerns shared facilities), has nothing to do with SDVO SBC joint ventures. Second, Appellant's "default assumption" exists nowhere in the law pertaining to either small business size status or to SDVO SBCs.

Finally, Appellant asserts on appeal the AD/GC failed even to acknowledge Appellant's second protest allegation, that "H&H, as the alleged SDVO SBC, was not readily identifiable." This statement is not an allegation and does not benefit Appellant's case. Hence, the AD/GC was correct not to consider it. *See C3T Construction*, at 3.

Appellant's SDVO SBC protest against H&H-DMS JV contained only unsupported assertions and thus was not sufficiently specific. 13 C.F.R. § 125.25(b). Appellant has not shown on appeal that the AD/GC's dismissal of Appellant's protest was based on any clear error of fact or law. Therefore, I conclude the AD/GC made no clear error in dismissing Appellant's protest for lack of specificity. 13 C.F.R. § 125.27(b)

## V. Conclusion

After reviewing the record, I hold the written protest file supports the AD/GC's dismissal of Appellant's protest. Therefore, Appellant has failed to establish any clear error of fact or law in the AD/GC's decision. Accordingly, I must DENY the instant appeal and AFFIRM the AD/GC's dismissal of Appellant's protest.

The AD/GC's determination is AFFIRMED and the appeal is DENIED.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.515(a).

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THOMAS B. PENDER  
Administrative Judge